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No. 84-1676

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

FLOYD H. PLUECKHAHN,
Petitioner-Plaintiff,

v.

FARMERS INSURANCE EXCHANGE,
FARMERS NEW WORLD LIFE INSURANCE CO.,
TRUCK INSURANCE EXCHANGE,
MID-CENTURY INSURANCE CO.,
FARMERS GROUP, INC.,
Respondents-Defendants,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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This case clearly does not present novel and important issues under §1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The courts below simply applied already well-established legal principles to the unchallenged set of facts found by the District Court. Both courts concluded that under a traditional Section 1 rule of reason analysis, Petitioner failed to establish an antitrust violation. Petitioner has presented no reason why this Court should disturb that conclusion.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Petitioner, Plaintiff below, sought to prove that Respondents, Defendants below (referred to collectively as Farmers Insurance Group),* violated Section 1 of the Sherman Antitrust Act by "conspiring" among themselves to deprive Petitioner of an opportunity to work for Oscar Pool; and alternatively tried to establish that a conspiracy with the same purpose existed between Respondents and Pool. The District Court held on several independent grounds that Plaintiff failed to establish any Sherman Act violation. The Court of Appeals affirmed, emphasizing that the restraint challenged by Petitioner was not unreasonable under the "rule of reason" analysis created by this Court for review of § 1 claims not involving per se violations.

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* There are no corporate parents, subsidiaries or affiliates of Respondents not included as a party to this case.

II. STATEMENT OF FACTS

The District Court's findings of fact, which have not been challenged by Plaintiff, succinctly relate the relevant factual background. A copy of the District Court's Findings of Fact and Conclusions of Law is in Petitioner's Appendix to his Petition for Writ of Certiorari.

The Court found that Respondents, with the exception of Respondent Farmers Group, Inc., are insurance companies engaged in the business of selling insurance to the public, that each writes a character of insurance which generally is not written by any other Respondent, and that no two Respondents are engaged in competition with each other in the same or similar insurance coverage.

The relationships among the Respondent companies which comprise the Farmers Insurance Group and the staff employed thereby were undisputed:

> *Finding of Fact No. 10.* Defendant Farmers Group, Inc. is a management company for the other Defendants and is an insurance holding company (Tr. 429). Functioning as a management company, Farmers Group, Inc. is responsible for the development of an agency force and for the sale of insurance coverage. It fulfills these responsibilities by means of ten regional offices. Texas is one of those regions, and Austin is the regional office headquarters for Texas. Farmers Group, Inc. and the other Defendants are together known and advertised as the Farmers Insurance Group (FIG). (Hereinafter this group will be referred to as "FIG" or "Farmers.")
>
> *Finding of Fact No. 11.* The group system of operation of FIG is common in the insurance industry. FIG and other groups, such as Allstate and State Farm, constitute a

substantial proportion of the American insurance industry (Tr. 431-32). The public benefits from the group system of operation in that consumers can purchase multiple types of insurance through one agent and benefit from centralized claims handling and administrative efficiencies (Tr. 430-31).

Finding of Fact No. 12. The Texas regional office of Defendant Farmers Group, Inc. is headed by a regional manager, who presides over, among other things, a sales branch of the office. The sales branch of the office (sometimes referred to as the "Regional Sales Manager's Staff"), is responsible for the marketing of the insurance products of the Farmers Insurance Group companies mentioned above. Such responsibility includes the recruitment, training and supervision of the agency force licensed by such companies. This division or branch of the regional office is headed by a regional sales manager who reports directly to the regional manager. Included on the Regional Sales Manager's Staff are the regional agency manager (R.A.M.), who has overall responsibility for the recruitment and training of an agency force, and five division agency managers (D.A.M.), who in turn supervise district managers in their respective divisions.

Finding of Fact No. 13. The district managers (D.M.s) of Farmers work under an appointment contract. It is their responsibility to recruit and train potential agents. Although the word 'district' usually denotes a geographical limitation, district managers are free to recruit agents whenever they wish. The district manager's specific responsbilities are to locate people interested in becoming Farmers insurance agents, to assist them in obtaining approval and licensing, and if those persons are approved by Farmers and licensed

> by the State regulatory agency, to train, supervise, and motivate them. The actual approval of such persons as Farmers' agents is a function of the Farmers Group, Inc. regional sales staff. The district manager does not actually sell insurance policies himself, nor is he personally involved in the reporting or collection of premiums (Tr. 314). The district managers are paid by an overwrite on each policy sold by an agent under their supervision. The district managers function as a key link in the sales management chain of Farmers Group, Inc. (Tr. 252).

In April, 1978, Petitioner, while employed by Respondent Farmers Group, Inc. as a Regional Agency Manager, secretly negotiated an employment contract with Oscar Pool, a district manager of Respondents in Dallas, Texas. This action conflicted with a Farmers Group written policy (quoted in pertinent part in District Court Finding of Fact No. 19 and in Footnote 5 of the Court of Appeals opinion), which generally prohibited for a limited time the employment by Farmers' district managers of certain Farmers Group, Inc.'s staff employees. Under this policy, which was expressly established to avoid any implication of manipulation or favoritism, Petitioner, as a member of the Regional Sales Manager's Staff, was not eligible to go to work for a district manager in the Texas Region for three years.

Both the District Court and the Court of Appeals found that this policy is reasonable, serves legitimate business purposes, is reasonably limited in time and geographic scope, and more specifically (quoting from District Court Finding of Fact No. 22):

> The policy is designed and functions to prevent the appearance of impropriety as well as actual impropriety. The policy addresses the potential for manipulation that could occur both before and after

> an employee leaves the regional office to work for a district manager. It prevents a situation where prior to leaving the regional office, an employee could obtain or attempt to obtain (or be perceived as obtaining) a wide variety of special favors for a district manager for whom the employee might then go to work. After leaving the regional office, the employee might exercise his influence on behalf of the district manager by using "inside knowledge" or by calling upon personal friendships with persons still in the regional office.

The District Court further found that, based on the foregoing policy, Defendant Farmers Group, Inc. requested Oscar Pool not hire Petitioner; that nine days later this request was withdrawn and that Farmers Group, Inc. gave express permission for Petitioner to work for Pool; and that, despite such permission, Oscar Pool chose not to hire Petitioner and settled his employment contract with Petitioner by paying him $6,000.00. Petitioner thereafter went to work for Stewart Spoede, another Farmers' District Manager operating in Texas (Tr. 161-162).

SUMMARY OF ARGUMENT

Petitioner has completely failed to establish that novel and important issues are present in this case or that the courts below erred substantially in passing upon Petitioner's claims. Since a review of this case would inevitably lead to the conclusion that the courts below applied correct legal principles to a factually meritless case, Petitioner's application for writ of certiorari should be denied.

Numerous decisions of this Court establish that a restraint is illegal under § 1 of the Sherman Act only if (1) it is entered into between two or more separate entities acting toward a

common goal, and (2) it unreasonably restrains competition in a relevant market.

In this case, Petitioner did not make the required showing of "concerted" activity by separate entities. No inter-Respondent conspiracy was established, for Respondents constitute a non-competing, common enterprise incapable of "conspiring" together within the meaning of § 1 of the Sherman Act. With respect to the claimed conspiracy between Respondents and Oscar Pool, the evidence reflects that Pool acted on his own in ultimately deciding not to employ Petitioner.

The evidence also supports the lower courts' conclusion that Respondents and Pool comprised a sufficiently unified economic entity to foreclose application of the "per se illegal" standard to the restraint challenged in this case. Not all restraints which can perhaps be labeled as "group boycotts" or "concerted refusals to deal" are per se illegal. The type of "restraint" challenged here, a unique, narrowly drawn provision found in a novel context which does not involve or impact any competitors of the alleged conspirators, is the very type of restraint which courts have recognized must be governed by the "rule of reason," and examined in its commercial context to evaluate the reasonableness of the burden it imposes on competition in the relevant market.

Even if Respondents were capable of conspiring, and even had they conspired to enforce a restraint which resulted in Oscar Pool refusing to employ Petitioner, the evidence supports the lower courts' conclusion that any restraint on competition in a relevant market created by such an agreement was reasonable and thus not in violation of § 1 of the Sherman Act. Thus, whether evaluated for its effect on the market for insurance products, which Respondents submit is the proper market

to examine, or for its effect on the market for the labor services of certain Farmers' employees, as Petitioner contends, the restraint challenged in this case produces an overall beneficial effect on competition.

ARGUMENT

For several independently sufficient reasons, the courts below found that Petitioner had failed to establish his claim that Respondents had violated Section 1 of the Sherman Antitrust Act, 15 U.S.C § 1. The courts held that Respondents form a common enterprise incapable as a legal matter of conspiring with one another to restrain competition; that in any event an agreement between such parties, or such parties and Oscar Pool, was not per se unreasonably restrictive of competition in any relevant market; that under a Sherman Act § 1 "rule of reason" analysis, the alleged agreement was a reasonable restraint; and that, in any event, Petitioner failed to show any sort of public injury arising out of the operation of the allegedly illegal restraint.

In his Application for Writ of Error, Petitioner asserts that these courts only reached these results by adopting and applying several erroneous legal standards to his claim. This Court's prior rulings, however, clearly support the conclusions of the lower courts. Therefore, this Court should deny Petitioner's Application for Writ of Certiorari.

I. Petitioner-Plaintiff failed to establish the restraint he challenges was unreasonable.

Not even all concerted restraints on competition violate § 1 of the Sherman Act — only "unreasonable" restraints. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-50, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977).

A bifrucated analysis applies to evaluate the reasonableness of a challenged restraint. Certain types of agreements, such as price fixing agreements, have been recognized by this Court as so inherently anti-competitive that they are categorically condemned as "per se" unreasonable, without any further inquiry into the actual effect of the restraint on the particular market involved. Other restraints that are not so easily classified as inherently anti-competitive must be examined under the "rule of reason," that is, their purposes and their effects on competition must be evaluated before they can be declared to be, on balance, unreasonable. Continental T.V., supra.

In this case, both lower courts concluded that the restraint alleged by Plaintiff in this case is not a per se violation of § 1 of the Sherman Act, and further, that it does not violate § 1 under the rule of reason.

A. The Per Se Rule of Illegality Does Not Apply to the Restraint Challenged by Plaintiff.

Petitioner argues that the activity in question constituted a "group boycott," and that such "group boycotts" are per se violations of the Sherman Act. This argument, however, has no merit. Virtually every legal scholar and court that have considered the question in recent years have concluded that not all conduct which can be labeled a "group boycott" is per se illegal under § 1 of the Sherman Act. Indeed, every recent decision that has addressed this issue has held that the per se rule should be applied only in situations involving competition or potential competition between one or more of the boycotters and the Plaintiff. Such is clearly not the case here.

In Blackburn v. Crum and Forster, 611 F.2d 102 (5th Cir. 1980), the court held that the per se approach was inapplicable to a challenge by insurance agents to an alleged "group boycott" by several insurance companies:

> It is true that certain Supreme Court boycott cases can be read broadly to require the application of the per se rule to all explicit concerted refusals to deal. See, e.g., Silver v. New York Stock Exchange, 373 U.S. 341, 81 S.Ct. 1246, 10 L.Ed.2d 389 (1963); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). Such an expansive reading may truly be proper in cases like those before the Supreme Court in which the Plaintiff, the excluded party, is on the same competitive level with one of the members of the conspiracy. . . .
>
> This case, however, provides a sharp contrast. . . . None [of the alleged conspirators] competes with the Plaintiff, an insurance broker. Accordingly, this case contains no horizontal aspect, but involves only vertical action undertaken by suppliers, the insurance company Defendants, against their agent, the insurance broker Plaintiff. The per se rule is therefore inapplicable.

Id., at page 104.

The 6th, 7th and 10th Circuits have held similarly: Com-Tel, Inc. v. DuKane Corporation, 669 F.2d 404, 409 note 6 (6th Cir. 1982) ("Although a group boycott has both vertical and horizontal characteristics, 'it is the horizontal element that justifies applying a rule of per se illegality' "); Spray-Rite Service Corporation v. Monsanto Company, 684 F.2d 1226, 1236 (7th Cir. 1982), affirmed, — U.S. —, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) ("A per se unlawful boycott has two essential elements: (1) at least some of the boycotters are competitive of each other and the target and (2) the boycott is designed to protect the boycotters from competition with the target,"); Board of Regents of the University of Oklahoma v. National Collegiate

Athletic Association, 707 F.2d 1147, 1160 (10th Cir. 1983), rev'd on other grounds, — U.S. —, 104 S.Ct. 2948 (1984) ("The crucial element is an effort by one competitor to exclude or cause disadvantage to one or more [of its] competitors by cutting them off from trade relationships which are necessary to any firm trying to compete," quoting L. Sullivan, Handbook of the Law of Antitrust, Section 91 at page 260).

In two cases which considered the type of Sherman Act analysis that should be applied to a "boycott" of the same type alleged in this case, i.e., one by potential employers of the Plaintiff employee, both courts opted for the rule of reason approach. Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1979); Mackey v. National Football League, 573 F.2d 606 (8th Cir. 1976). See also U.S. Trotting Association v. Chicago Downs Association, Inc., 665 F.2d 781, 788 (7th Cir. 1981); Marrese v. American Academy of Orthopedic Surgeons, 706 F.2d 1488, 1495 (7th Cir. 1983); North American Soccer League v. National Football League, 670 F.2d 1249 (2nd Cir. 1982); Union Circulation Company, Inc. v. Federal Trade Commission, 241 F.2d 652 (2nd Cir. 1975); and the cases cited in Smith, supra, 593 F.2d at pages 1179-1181.

As authority for his position regarding the propriety of applying the per se rule of illegality to this case, Petitioner cites this Court's decision in St. Paul Fire and Marine Insurance Company v. Barry, 438 U.S. 531, 98 S.Ct. 2932 (1978). Barry, however, provides no support for Petitioner's position. This Court expressly declared in Barry that it was not being called upon to decide whether the boycott involved there was a per se violation of the Sherman Act. The question for decision, said this Court, "was whether the conduct in question involved a boycott, not whether it is per se unreasonable." 438 U.S. at 542, 98 S.Ct. at 2930.

In addition to the above-cited case authority regarding the inapplicability of the per se rule in cases not involving horizontal competition between the alleged boycotters and the object of the boycott, other elements present in this case which mandate a rule of reason analysis, rather than a per se declaration of illegality. The alleged conspirators, Pool and Respondents, share a true "unity of purpose"; they work with each other to attain the same ultimate and legitimate goals. The "conflict of interest" provision challenged by Petitioner furthered the attainment of those goals. Moreover, enforcement of the restraint causes in no effect outside the Farmers Group system on the narrowest possible market in this case — the market for insurance employees. Finally, the restraint is a somewhat novel one, found in a unique context. It simply cannot be said, without any analysis whatsoever, that the restraint "clearly has no purpose except stifling of competition." White Motor Company v. United States, 372 U.S. 253, 263, 83 S.Ct. 696, 702 (1963).

B. Under the Rule of Reason, Respondents Challenged Restraint is Reasonable, and Thus Not a Violation of the Sherman Act.

Under a § 1 rule of reason analysis, courts are required to examine the challenged restraint, its history, its context and its effects, and, after balancing the burdens and benefits placed on competition by the restraint, determine whether the restraint is reasonable. In making this evaluation, a court generally will be required to analyze "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." National Society of Professional Engineers v. United States, 425 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978).

As the trial court found and as shown by the evidence, the policy in question in this case was narrowly drawn, carefully

limited and preserved substantial employee freedom and opportunities for the employees effected:

1. The policy applied to only 17 of 550 Texas regional employees, and only 200 of the 11,600 Farmers Group total employees.

2. The policy allowed the affected employee to work for any other employer in the world.

3. The policy allowed the affected employee to work for any Farmers District Manager outside the Texas region — and there were some 450 District Managers outside Texas.

4. The policy allowed the affected employee to work for any District Manager in Texas after three years.

The policy was reasonable, as well as narrow. As stated in the policy, its purpose is to "avoid any implication of manipulation or favoritism." Even Petitioner conceded at trial the importance of fairness in a relationship between District Managers and a Division Agency Manager or Regional Agency Manager.

Both with respect to the insurance policy market (which Respondents contend is clearly the proper market to consider) and with respect to the employee market (which Petitioner wrongfully contends is the proper market to consider), the policy has important pro-competitive effects:

1. Avoidance of the personnel, financial and business problems associated with the favoritism and manipulation that the policy is designed to prevent has the effect of encouraging and maintaining good employee morale among all persons involved, including (a) employees who work in the regional office, (b) affected employees who leave to work for District Managers in a manner consistent with

the policy (e.g., in another region), and (c) District Managers, who will know and remain confident that the relationship between the regional office and the District Managers will be honest, fair and conducted in a businesslike manner. That knowledge and attitude obviously contribute to a better, more competitive work force and sales force.

2. By assuring that business resources will be allocated among District Managers on the basis of sound business and economic reasons, rather than on the basis of favoritism and manipulation, the policy guarantees that the business operations will be more competitive.

3. The RAM and DAM are responsible for establishing new districts and splitting or combining old districts. By assuring that those decisions are made for sound business and economic reasons, rather than for favoritism, the policy promotes competition. Establishing and maintaining districts where the business can grow and prosper aids directly the Farmers Insurance Group competitive position in the marketplace.

4. The RAM and DAM train and assist District Managers in recruiting, selecting, licensing and training agents. By assuring that such assistance and energies are equitably allocated among District Managers, the policy promotes the recruitment, selection, training and retention of the best and most competitive agents and agency sales force. As even Petitioner conceded, sometimes some DMs can seem to have agent applications approved easily while other DMs seem to have more difficulty. Indeed, Petitioner ruled upon several agent applications for Oscar Pool during the time Petitioner was Regional Agency Manager and even after he had begun negotiating with Pool and

after he had signed a contract to begin employment with Pool. In fact, Petitioner himself admitted that the number of Pool's applicants he approved was suspiciously large, suggesting that he did show favoritism toward Pool. Proper agent selection practices — assured by the policy in question — promote legitimate and fair competition in the employment of agents, promote District Managers and District Managers' staff morale, and promote Farmers Insurance Group's overall competitive position in the market.

5. The policy improves the Farmers Insurance Group competitive position by assuring sound business decisions concerning District Manager quotas and growth. Each DAM determines quotas or targets for District Managers in his division. Meeting quotas can entitle a District Manager to benefits such as expense paid trips, life insurance coverage increases, and recognition that facilitates the District Manager's recruitment of more and better agents — again improving the Farmers Insurance Group competitive position.

6. The DAM reviews and evaluates the results obtained from District Managers to recognize outstanding accomplishments and, when necessary, takes prompt action to remedy weaknesses and to replace District Managers when necessary with qualified replacement District Managers. Replacement of unsatisfactory District Managers based upon an objective, fair appraisal, rather than upon favoritism or manipulation, again enhances the competitive structure and position of Farmers Insurance Group.

7. The DAM recommends for approval or termination "all agent subsidies" and "agent office subsidies." Allocating those resources on the basis of sound business reasons,

> rather than favortism, again contributes to Farmers Insurance Group's competitive position by developing and maintaining successful agents.

The foregoing examples make clear the policy's competitive value. Other DAM and RAM responsibilities and the multiple dangers posed by DAM and RAM manipulation and favortism are described at some length in the opinion of the Court of Appeals.

The fallacy in Petitioner's clamor regarding the "need" for employees to market their services without restrictions further shown by the frequency with which such reasonable restrictions are found in other employment, such as that of government employees in their post-government service. Those employees are frequently limited in a manner similar to the manner in which Petitioner was or may have been restricted in this case, with the purpose of preserving the appearance and reality of propriety and confidence in governmental institutions. This Court's own rules, for instance, create a two-year limitation on practice:

> No one serving as a law clerk . . . and no other employee of this Court shall . . . after separating from this position participate . . . in any case before this Court until two years have elapsed after such separation . . . .

Rule 7, United States Supreme Court Rules. See also, e.g., 18 U.S.C. § 207(b), (d) (Criminal penalty for ex-employees of federal agencies acting as attorneys in matters formerly under their responsibility within two years following employment); 9 Merton's Law of Federal Income Taxation, § 49.226 (Treasury Department regulations, Circular 2300, § 10.26: one year limitation on certain former government employee's employment by persons

appearing before IRS or Treasury Department); Texas Revised Civil Statutes Annotated, Art. 1446c, § 6(i) (Texas Public Utilities Regulatory Act — one year post employment prohibitions on employees being employed by public utilities).

Unquestionably, the restraint challenged in this case by Petitioner, even if it were applied to him, is reasonable under the rule of reason analysis approved by this Court, and the lower courts correctly so held.

II. Petitioner-Plaintiff failed to establish the existence of "concerted action" necessary under § 1 of the Sherman Antitrust Act.

Not every restraint on trade or competition is prohibited by § 1 of the Sherman Act. Section 1 only reaches to restraints on competition involving concerted action, that is, action brought by a plurality of actors with a common goal.

> Section 1 of the Sherman Act, 15 U.S.C.A. § 1, forbids, "every contract, combination . . ., or conspiracy, in restraint of trade . . . ." Essential to every § 1 offense is concert of action between separate business entities. It is axiomatic that unilateral activity by a single firm cannot be reached via this section.

Spectofuge Corporation v. Beckman Instruments, Inc., 575 F.2d 256, 286 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979). See also Copperweld Corporation v. Independence Tube Corporation, — U.S. — , 104 S.Ct. 2731, 2740, 81 L.Ed.2d 628 (1984).

Petitioner wholly failed to establish this required element of concert of action, and his theories of conspiracy among the Respondents themselves, and between Respondents and Oscar Pool, were correctly rejected by both lower courts.

A. Petitioner Failed to Establish the Existence of a Conspiracy Among Respondents Themselves.

Petitioner attempted to establish that, apart from any agreement with Oscar Pool, various Respondents in the Farmers Insurance Group were capable of conspiring together, and that such conspiracy actually existed. The purported conspiracy was an alleged agreement among the Defendant companies, based on the Farmers Group, Inc. (FGI) policy described above, to force Pool to refuse to employ Petitioner. Both as a factual matter and as a legal matter, however, Petitioner's inter-company conspiracy theory is unsupportable.

As a factual matter, Petitioner's assertion of an inter-company conspiracy completely ignores both the actual events which form the basis of this suit and the nature of Respondents' operations. All of the evidence regarding the policy and the events surrounding its application reveal that Respondent FGI, the management company that directs the affairs of all the other Respondents, was the author and the only author of the policy challenged in this case, and that FGI, through its agents and employees, was the only Respondent that had any role in attempting at any time to enforce the policy against Petitioner. Indeed, no other Respondent even has any individual management staff. Thus, there was no evidence presented of a plurality of the Respondents committing the conspiracy claimed, and thus Petitioner did not demonstrate the existence of the conspiracy among just the Respondents.

Furthermore, as a legal matter, the Farmers Insurance Group companies were and are incapable of producing among themselves the "concerted action" required by § 1 of the Sherman Act, for these companies form a single economic entity engaged in a common enterprise. As shown by the evidence, and as

found by the District Court and the Court of Appeals, FGI manages the other members of the Farmers Insurance Group who are the Defendants in this case. Thus, a centralized single management is responsible for directing the affairs of all the Defendants. Moreover, none of the Defendants is in competition with any of the other Defendants; each writes a distinct, separate type of insurance; all are collectively advertised and marketed as "The Farmers Insurance Group" by the very same agents. In truth, these companies comprise a "common enterprise" incapable of concerted group activity.

Thus, this case is controlled by the Court's ruling in Copperweld Corporation v. Independence Tube Corporation, — U.S. — , 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). In Copperweld, this Court considered a jury verdict that left a parent corporation and its wholly-owned subsidiary as the only parties to a § 1 conspiracy. In reversing the judgment that the trial court had entered in favor of the Plaintiff, Independence Tube Corporation, the Court noted that the case directly raised the question of "whether the coordinated acts of a parent and its wholly-owned subsidiary can, in a legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy." Id., 104 S.Ct. at 2736.

This Court held that Defendant Copperweld and its wholly-owned subsidiary were "incapable of conspiring with each other for purposes of § 1 of the Sherman Act." Id., 104 S.Ct. at 2745. In reaching that holding, the Court analyzed in detail the coverage afforded by the Sherman Act, and concluded that the Act "reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is 'wholly unilateral'." Id., 104 S.Ct. at 2740 (emphasis in the original). This Court recognized repeatedly that actors within a single business entity do not have the

requisite separation of economic interest to bring their agreements within the anti-competitive reach of the Sherman Act:

> The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing their divergent goals. Coordination within a firm is likely to result from an effort to compete as from an effort to stifle competition. In the market place, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.
>
> There is also general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions.

Id., 104 S.Ct. at 2741.

This Court identified as appropriate criteria to such an analysis whether there existed "a complete unity of interest," "common objectives," and "one corporate consciousness":

> A parent and its wholly-owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver.

Id., 104 S.Ct. at 2742. In sum, the Court concluded that the intra-enterprise conspiracy doctrine improperly "looks to the

form of an enterprise's structure and ignores the reality." Id., 104 S.Ct. at 2743.

Thus, Copperweld recognized that the realities of corporate business management result in a wide variety of business organizational forms chosen for valid reasons entirely unrelated to any anti-competitive intent. Such reasons can include product differences, geographical considerations, decentralization of management, economic factors, taxation systems, etc.

> The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition. Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability.

Id.

In this case, Petitioner is in effect arguing for a unique application of a now discredited intra-enterprise doctrine — that a conspiracy arose in the conduct of a single actor merely because the interests of more than one inter-related corporate entity were involved. Although Copperweld specifically addressed the question of whether a parent and a wholly-owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act, plainly this Court investigated that issue in response to wide-spread criticism of the intra-enterprise conspiracy doctrine, and the Court's ultimate decision was governed by the principle that form should not be permitted to control over the true substance of a transaction.

The principles and logic of Copperweld clearly dictate that the Farmers Group companies as they are structured are also incapable of forming a conspiracy under § 1 of the Sherman Act. Three of the insurance company Respondents, Farmers Insurance Exchange, Truck Insurance Exchange and Fire Insurance Exchange, have no capital stock, being reciprocal exchanges operated by a common attorney-in-fact, FGI. The remaining two Respondents are stock companies, each of whose entire capital stock is owned by the other Respondents. Petitioner has not challenged and cannot challenge the fact that valid, good faith and legitimate business reasons have led to the form of corporate organization resulting in Farmers Group, Inc. management. If groups of commonly-owned, non-competing companies are to be permitted to operate with joint management and with common employees, common personnel "policy" is a necessity whether such common employees are considered to be jointly employed by all of the companies in the group or, as in this case, employed by a single management company.

The mere circumstance that the staff of FGI was engaged in the business of selling the products of more than one company of a group of non-competing inter-related companies, as opposed to the products of but a single company, does not present a case of concerted activity within the ambit of the Sherman Act. As this Court noted in Copperweld, the central criticism of the intra-enterprise conspiracy doctrine was that such doctrine "treats as the concerted activity of the two entities what is really unilateral behavior flowing from the decision of a single enterprise." With the common management and ownership of the Farmers Group companies, there is but a single enterprise and "their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." Id., 104 S.Ct.

at 2742. Likewise, this Court's analogy of the Copperweld facts to "a multiple team of horses drawing a vehicle under the control of a single driver," applies precisely to the Farmers Group.

B. Petitioner Failed to Establish the Existence of a Conspiracy Between Respondents and Oscar Pool.

Petitioner also attempted to prove the existence of a conspiracy between Oscar Pool and Respondents to prevent the Petitioner's employment by Pool. Petitioner failed to obtain a fact finding of such a conspiracy, however, and the evidence reflecting that Pool decided not to hire Petitioner because of other reasons supports the trial court's finding that it was Pool who "chose" not to hire Plaintiff.

Even assuming, however, that Pool and FGI and perhaps some of the other Respondents acted together in declining to employ Petitioner, no § 1 violation would exist. The evidence established that any restricted activity by and between Pool and Respondents effected only employment opportunities within a single economic unit. District Managers such as Pool are an intergral part of Respondents' overall business, and constitute a key link in the sales management chain of FGI. Respondents, acting through the management company, FGI, rely upon DMs such as Pool for the proper functioning of their sales structure. Moreover, the DMs' interests is the same as that of FGI, in that the more business that is written, the more money they both earn. DMs are contractually bound to comply with Respondents' policies and regulations, and are dependent upon Respondents for the types and amounts of insurance the agents under them write.

The record in this case discloses that other groups of insurance companies, such as the Allstate and State Farm groups, have persons that perform functions identical to that performed

by the DMs in the Farmers organization, with the only distinction being that such other companies treat those persons as common law employees rather than independent contractors. The record further discloses that Oscar Pool's function as DM for Farmers was but an integral part of the common enterprise of the Farmers Group in the solicitation and management of its sales agency force. While the DM, being given the independent contractor status in the Farmers team, may have a degree of independence in the way he functions, distinct from that of a common law employee, it is clear that the DM is not a separate economic entity. DMs, whether common law employees or independent contractors, are not "separate economic actors pursuing separate economic interests," from that of the Farmers companies.

Paraphrasing Copperweld, 104 S.Ct. at 2742,

> A rule that punished coordinated activity simply because a corporation delegated certain responsibility to an autonomous [District Manager] might well discourage corporations from creating such autonomous [employees] with their presumed benefits. This would serve no useful antitrust purpose, but could well deprive consumers of the efficiencies that decentralized management may bring.

While the specific relationship between Farmers and its District Managers may well have significance in other economic or legal areas, whether Farmers elects to treat its District Managers as independent contractors rather than common law employees, is "not relevant to whether the enterprise's conduct seriously threatens competition." Id., 104 S.Ct. at 2743.

Thus, Petitioner's conspiracy claims, which were clearly erroneous even before Copperweld, are now even more clearly

unfounded in light of this Court's analysis and rejection of the so-called intra-enterprise conspiracy doctrine.

CONCLUSION

For the reasons detailed above, as well as for those contained in the opinion of the Court of Appeals and in the Conclusions of Law and Findings of Fact of the District Court, Petitioner did not establish a claim against Respondents under § 1 of Sherman Antitrust Act. The courts below have applied established legal principles that follow rather than conflict with any decisions of this Court. Consequently, Petitioner's Application for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing Respondents' Brief in Opposition have been deposited in a United States Post Office or mailbox, with first class postage prepaid, addressed to all parties required to be served, viz., Samuel D. McDaniel, 1800 American Bank Tower, Austin, Texas 78701 on this the 24 day of May, 1985.

Charles Herring, Jr.